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In the Supreme Court of the United States

CASE NO. 1091

OCTOBER TERM, 1946

C. W. FALWELL, JR., AND FALWELL FAST FREIGHT, INCORPORATED

APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL

APPELLEES

BRIEF OF APPELLANTS OPPOSING THE MOTION TO AFFIRM FILED BY APPELLEES

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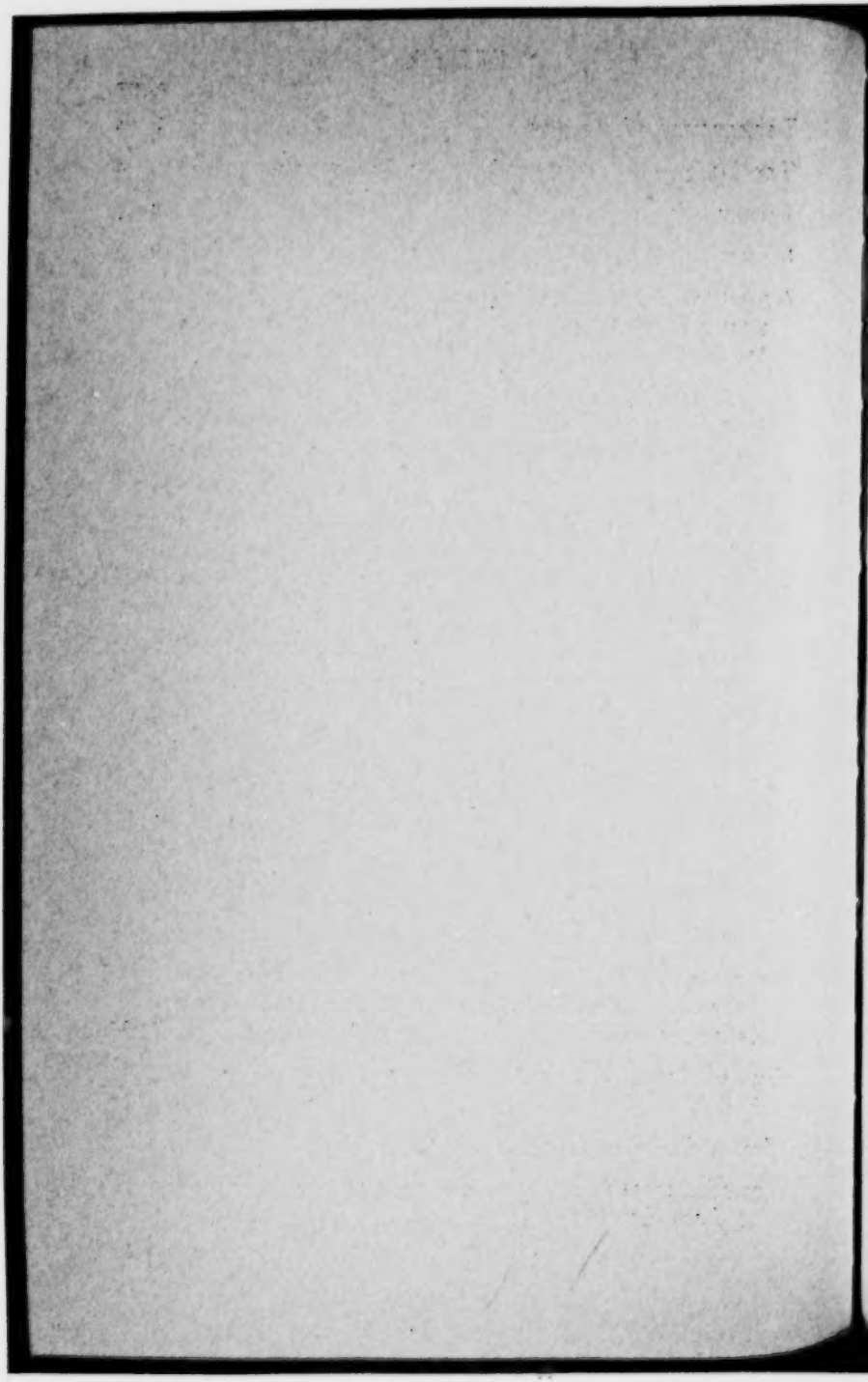

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This is a direct appeal in Falwell, et al v. United States, et al, 69 F. Supp. 71, from the final decree dated December 21, 1946, of a specially constituted District Court of three judges, established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing Appellants' complaint for an order enjoining, setting aside and forever annulling the report and order of the Interstate Commerce Commission dated January 14, 1946, reported at 40 M.C.C. 489, reversing, in part, the report and order of Division 4 dated February 22, 1945, reported at 40 M.C.C. 127.

BACKGROUND OF THE SUIT

The background of this suit will help to better understand the issues presented to this Honorable Court. On or about July 31, 1944, C. W. Falwell, Jr., and Falwell Fast Freight, Incorporated (hereinafter called Falwell), W. B. Draper, doing business as Draper Motor Service (hereinafter designated Draper) and Evans Lines, Incorporated, filed a joint application under Section 5 of the Interstate Commerce Act (49 USCA 5) with the Interstate Commerce Commission seeking approval of and authorization by the Commission for Falwell to purchase and Draper to sell a part of his certificate of public convenience and necessity authorizing interstate operation between Roanoke, Virginia, and Lynchburg, Virginia, over irregular routes, transporting general commodities.

Falwell applied to the Commission, under the provisions of Section 210a(b) of the Act (49 USCA 310a(b)) for temporary lease authority for a period of 180 days and the Commission, on the 26th day of August, 1944, granted the application of Falwell for temporary lease authority. Falwell instituted operations between Roanoke and Lynchburg in September 1944 under the temporary lease authority and Falwell conducted operations under the lease authority until February 21, 1945, when that authority automatically expired. On February 14, 1945, Falwell filed a petition with the Commission seeking to have the temporary lease authority extended for a period of 90 days beyond February 21, 1945, so as to prevent interruption of service by Falwell between Roanoke and Lynchburg and to allow the Commission additional time in which to dispose of the application to purchase on its own merits. Obviously, Falwell would have to disrupt the services and operation between Lynchburg and Roanoke, unless the Commission should, by February 22nd, 1945, at the latest, either (1) extend the lease authority, or (2) approve Falwell's purchase from Draper.

Consequently, Falwell would have discontinued operation between Roanoke and Lynchburg on February 21, 1945, but for the fact that on February 22, 1945, the telegram quoted below was received from the Commission. The telegram follows:

> "Retel MC-F-2600. Release made to press advising action Division Four authorizing Falwell purchase Draper and Evans operating rights subject condition respecting amortization increase intangible over five-year period. In view purchase authorization, petition extend lease denied. Please advise date consummation purchase. Copy report will follow. Refer F."

Therefore, to prevent any interruption in service between Roanoke and Lynchburg the purchase was consummated on February 22, 1945, and on February 22, 1945, Falwell began conducting operation in his own name and adopted and made them his own all tariffs, traffic agreements, et cetera, filed by Draper covering the operation between Roanoke and Lynchburg. The haste, therefore, in consummating the purchase was necessitated by the dire necessity of preventing any interruption in service between Roanoke and Lynchburg and not to strengthen the position of Appellants in this suit or before the Commission.

Protestants before the Commission, on March 9, 1945, after Falwell had consummated the purchase and conducted operations between Roanoke and Lynchburg for 16 days in his own name, filed a petition with the Commission seeking reconsideration of the report of Division 4 dated February 22, 1945, (40 M.C.C. 127) and the Commission, on May 7, 1945, granted the petition, but the order and report of Division 4 dated February 22, 1945, were not stayed. On January 14, 1946, the Commission, on reconsideration, denied the application of Falwell to purchase the operating rights of Draper and issued an order giving effect to the report of January 14, 1946, and that order was postponed from time to time, with a final

effective date of February 8, 1947. During the pendency of one of the orders postponing the effective date of the order of January 14, 1946, this suit was instituted on July 7, 1946, in the District Court for the Western District of Virginia.

THE ONLY ISSUES PRESENTED TO THE COMMISSION

Section 5 of the Act (49 USCA 5), the section of the Act under which the application to purchase the operating rights of Draper was filed, provides only two issues and those issues are:

(1) Is the proposed purchase by Falwell and the proposed sale by Draper of a part of his certificate to Falwell covering his operating rights between Roanoke and Lynchburg within the scope of Section 5 (2) (a) of the Act, and

(2) Will it be consistent with the public interest for Falwell to purchase and conduct whatever operations between Roanoke and Lynchburg that Draper is authorized to perform in the place of Draper?

No other issues than those provided in Section 5 of the Act were presented to the Commission or were proper for consideration in this proceeding. Division 4 of the Commission, on February 22, 1945, found the transactions within the scope of Section 5 (2) (a) and to be consistent with the public interest, and approved the purchase and authorized the transfer of the certificate from Draper to Falwell to be effective upon consummation of the purchase.

FOREIGN ISSUES

The protestants, by their petition for reconsideration of March 9, 1945, raised issues foreign to the issues set forth in Section 5 of the Act (49 USCA 5), which foreign issues caused the Commission, on January 14, 1946, to render a

report and order denying Falwell the right to purchase from Draper his operating rights between Roanoke and Lynchburg. The report and order of January 14, 1946, contrary to the narrow issues contained in Section 5 of the Act (49 USCA 5), did:

(a) Suspend or terminate a certificate of public convenience and necessity, or its equivalent, the authority under which Falwell had conducted operation between Roanoke and Lynchburg for over 10 months in his own name, contrary to the provisions of Section 212 (a) of the Act (49 USCA 312 (a));

(b) Impose limitations and restrictions upon the kind of service that Draper could render differing from the kind of service Draper is specifically authorized in his certificate to render, contrary to the provisions of Section 208 (a) of the Act (49 USCA 308 (a)) and contrary to the provisions of Draper's certificate;

(c) Construe the term "irregular routes," the routes over which Draper is authorized in his certificate to operate between Roanoke and Lynchburg in rendering common carrier service, to mean "service" and not highways over which Draper must operate, contrary to the specific provisions of Section 208 (a) of the Act (49 USCA 308 (a));

(d) Impose, in determining the kind of common carrier service to be rendered by a carrier, a different test for common carriers authorized to operate over irregular routes than the test used for common carriers authorized to operate over regular routes, which is contrary to the provisions of Section 203 (14) of the Act (49 USCA 303 (14)) and to the provisions of Sections 206 (a) and 208 (a) of the Act (49 USCA 306 (a) and 308 (a)); and

(e) Determine the operating rights granted to Draper, contrary to the last ordering paragraph of the order of February 22, 1945, which ordering paragraph

the Commission adopted as its own in its report and order of January 14, 1946, which paragraph follows:

> "And it is further ordered, That nothing herein contained shall be construed as a determination of the operating rights of any person or persons under any section of the Act except Section 5 thereof, as expressly determined herein."

Notwithstanding the fact that the Commission specifically ordered that nothing contained in the report and order of February 22, 1945, and of January 14, 1946, shall be construed as a determination of the operating rights of any person or persons, the fact remains that the report and order of January 14, 1946, have formed the nucleus for the Commission to draw a line of demarcation between the kind of service a carrier authorized to operate over irregular routes may render and the kind of service a carrier authorized to operate over regular routes may render. Therefore, if the report and order of January 14, 1946, did not determine the operating rights of Draper and those of Falwell; did not impose limitations and restrictions upon the kind of service Draper could render differing from the kind of service a regular route carrier may render; did not construe "irregular routes" to mean "irregular route carrier service"; and did not impose a different test for irregular route carriers than the test used for regular route carriers in determining the kind of service each is to render, then why were the report and order of January 14, 1946, and the decree of the District Court in this proceeding used to support the report and order of the Commission dated February 3, 1947, in Docket MC-C-246, Transportation Activities of Brady Transfer and Storage Company? In the Brady Case supra, at sheet 14 of the report, the following appears:

> "The argument of some opposed to our tentative conclusions that a grant of irregular-route authority

allows a carrier to perform *any* service in *any* manner it desires over any route it chooses within the territorial and commodity limits of its certificate or permit will next be discussed. * * Clearly, particularly in the light of the Falwell Case above quoted, it has no merit but it is seriously urged and will be discussed."

Therefore, the report and order in 40 M.C.C. 489, dated January 14, 1946, are erroneous as a matter of law, as they:

(a) Suspend or terminate a certificate or its equivalent;

(b) Determine the kind of operating rights granted to Draper;

(c) Determine how Draper is to use those rights;

(d) Determine the kind of service a regular route carrier and an irregular route carrier may render;

(e) Impose limitations and restrictions upon the kind of service Draper and Falwell can render differing from the kind of service they are authorized to render in their certificates;

(f) Are inconsistent with the definition of "consistent with the public interest" as used by the Supreme Court of the United States in *U. S.* v. *Lowden*, 308 U. S. 25; and

(g) Are contrary to the specific provisions of Section 5 of the Act (49 USCA 5).

MOTION OF APPELLEES

The motion to affirm, filed by Appellees, contains four points, which are:

(1) That the report and order of Division 4 of February 22, 1945, were reviewable by the full Commission and were not a certificate;

(2) That the Commission did not commit error when it recognized and applied the distinction between regular and irregular route service;

(3) That the Commission's report and order of January 14, 1946, are not contrary to the provisions of Section 5; and

(4) That the findings of the Commission must be accepted as true in the absence here of the complete record made before the Commission.

APPELLEES AVER THAT THE REPORT AND ORDER OF DIVISION 4 OF FEBRUARY 22, 1945, WERE REVIEWABLE BY THE FULL COMMISSION AND WERE NOT A CERTIFICATE

The report and order of January 14, 1946, are erroneous as a matter of law, as they are contrary to the specific provisions of the statute.

Congress provided, in Section 206 (a) of the Act (49 USCA 306 (a)), that no common carrier by motor vehicle *shall* engage in interstate operation unless there is in force with respect to such carrier a certificate authorizing such carrier to engage in interstate operation. Consequently, when the Commission permitted Falwell, pursuant to the report and order of February 22, 1945, to consummate the purchase, to file tariffs in his own name, to actually engage in interstate operation between Roanoke and Lynchburg, and to exercise all the rights and privileges incident to the ownership of the operating rights between Roanoke and Lynchburg, the Commission thereby made the authority granted on February 22, 1945, a certificate within the meaning of Section 206 (a) of the Act, because the Commission is without statutory authority to authorize Falwell to engage in interstate operation unless at the same time the Commission issues a certificate to Falwell (Section 206 (a)) of the Act (49 USCA 306 (a)).

Congress provided that no carrier shall engage in interstate operation without a certificate and then provided in Section 212 (a) of the Act (49 USCA 312 (a)) that a certificate shall be effective from the date specified in the

certificate and that it shall remain in effect until suspended or terminated as specifically provided in Section 212 (a) of the Act. The Commission, on February 22, 1945, did authorize Falwell to engage in interstate operation and provided upon the consummation of the purchase that Falwell would be entitled to a certificate covering the Draper rights, which purchase Falwell did consummate on February 22, 1945, and on that date did actually begin to engage in interstate operation between Roanoke and Lynchburg. Consequently, the report and order of January 14, 1946, are erroneous as a matter of law, as they seek to suspend or terminate a certificate issued on February 22, 1945, and effective upon consummation of the purchase on February 22, 1945, contrary to the procedure provided in Section 212 (a) of the Act (49 USCA 312 (a)) for suspension or termination of a certificate.

Congress provided in Section 17 (6) of the Act (49 USCA 17 (6)) that any decision, order, or requirement made by the Commission or a division thereof is subject to an application for rehearing, reargument, or reconsideration, but Congress did not make a certificate issued under Section 206 (a) of the Act (49 USCA 306 (a)) subject to an application for rehearing, reargument, or reconsideration, because a certificate is nowhere mentioned in Section 17 of the Act (49 USCA 17) as being subject to an application for rehearing, reargument, or reconsideration.

A decision, order, or requirement of the Commission granting operating authority to a carrier authorizing the carrier to engage in interstate operation *is not subject to review* under the provisions of Section 17 of the Act, because such an order, decision or requirement, after it becomes effective and operations thereunder are being conducted, ceases to be an order, decision, or requirement and becomes a certificate within the meaning of Section 206 (a) of the Act (49 USCA 306 (a)) and that authority can only be suspended or terminated in accordance with the provisions of Section 212 (a) of the Act (49 USCA 312 (a)) and not by the provisions of Section 17 of the Act.

A decision, order, or requirement granting operating authority *is not subject to review* by the Commission, as Section 210a (a) of the Act (49 USCA 310a (a)) authorizes the Commission to grant temporary authority without hearings or other proceedings and that section provides that such authority shall be valid for such time as the Commission shall specify unless revoked or suspended for good cause. Therefore, if Section 17 applies to operating authority then temporary operating authority could never be granted without a hearing and the proceeding kept open waiting for an application for review.

Therefore, as Falwell was authorized on February 22, 1945, to engage in interstate operation, the minute Falwell consummated the purchase on February 22, 1945, a certificate was automatically issued to him, which certificate marks the end of that proceeding and such a certificate is not subject to an application for rehearing, reargument, or reconsideration.

Congress provided in Section 221 (b) of the Act (49 USCA 321 (b)) that all orders of the Commission shall take effect within such reasonable time, not less than 30 days, as the Commission may prescribe, but a certificate required by Section 206 (a) of the Act and issued pursuant to Section 208 (a) of the Act (49 USCA § 306 (a) and 308 (a)) may become effective at the pleasure of the Commission, as a certificate is not an order, consequently, a certificate is not subject to a waiting period of 30 days before becoming effective. Falwell was authorized to engage in interstate operation upon consummation of the purchase, which operation could not have been authorized without the issuance of a certificate to Falwell. Therefore, when Falwell consummated the purchase and began to engage in interstate operation on February 22, 1945, that operation was being conducted by virtue of a certificate and not by an order, as the Commission could not authorize Falwell to engage in interstate operation on an *order* issued by the Commission. Consequently, the operating au-

thority became effective upon consummation and that authority is subject to the provisions of Section 212 (a) of the Act and not subject to the provisions of Section 17 of the Act or Section 221 (b) of the Act.

The decision of this Honorable Court in *Baldwin* vs. *Milling Co.*, 307 U. S. 478, to which appellees refer, apparently has no application here, as an order of the Commission is not involved here as it was involved in the *Baldwin* vs. *Milling Co. Case supra,* for the simple reason that the Commission cannot, by an order, authorize a carrier to engage in interstate operation, as such operation must be authorized by a certificate. Consequently, the referred-to decision apparently has no application whatever to the issues involved in this suit as the issuance of a certificate and not an order is involved in this suit. Nor do we think the decisions of this Honorable Court in *Baltimore & Ohio Railroad Company* vs. U. S., 298 U. S. 249, 370-1; *Federal Radio Commission* v. *Nelson Brothers,* 289 U. S. 266 285-6, have any application to this suit because this proceeding does not involve *an order* of the kind referred to in Section 17 of the Act (49 USCA 17), as this proceeding concerns the issuance of authority to engage in interstate operation which operation can only be authorized by a certificate. Consequently, the action of Division 4 of February 22, 1945, was not subject to review by the Commission after Falwell consummated the transactions because the operation authorized could only be conducted by virtue of a certificate and not by a mere order of the Commission. As a matter of fact, the report and order of Division 4 of February 22, 1945, granted Falwell the same kind of operating authority, although the evidence of the authority was not physically issued to Falwell, as the authority the Commission granted Seatrain, which authority this Honorable Court, in *U. S.* v. *Seatrain Lines, Inc.,* 91 Law Ed. 311 decided January 6, 1947, held could not be revoked by the Commission.

APPELLEES AVER THAT THE COMMISSION DID NOT COMMIT ERROR WHEN IT RECOGNIZED AND APPLIED THE DISTINCTION BETWEEN REGULAR AND IRREGULAR ROUTE SERVICE

There is no statutory difference, for instance, between a common carrier by motor vehicle operating *over specified routes* between Lynchburg and New York with service at intermediate points and a carrier operating over *irregular routes* between Roanoke and Lynchburg with no service at intermediate points *as to the quantity and quality of service to be rendered.* In each instance, each carrier is to operate between designated points, rendering the same "common carrier service" and it is just as reasonable to say that a *regular route carrier is operating "radially"* between Lynchburg and New York, as it is to say that an *irregular route carrier is operating "radially"* between Roanoke, on the one hand, and Lynchburg, on the other. There is no statutory authority for drawing a line of demarcation between the kind of "common carrier service" a carrier may render operating between New York and Lynchburg over regular routes and the kind of service a carrier may render operating between Roanoke and Lynchburg over irregular routes, notwithstanding the fact that one carrier is to operate over specified routes and the other carrier is not authorized to operate over specified routes because in the language of the statute both carriers are common carriers by motor vehicle. Section 203 (14) of the Act (49 USCA 303 (14)) does not make any distinction between a "common carrier by motor vehicle" over regular routes and a "common carrier by motor vehicle" over irregular routes *as to the service to be rendered* nor does Section 204 (b) of the Act (49 USCA 304 (b)) delegate to the Commission authority to classify one carrier as a *radial carrier* and another carrier

as a *non-radial carrier* when, as here, the operation of each carrier is between designated points. Moreover, the certificate issued to Draper under his grandfather application does not designate Draper as a *radial carrier between Roanoke and Lynchburg* any more or less than the certificate issued to Falwell covering operation between Lynchburg and New York designates Falwell as a *non-radial carrier.* Consequently, there is no statutory difference in the service to be rendered by a carrier operating over irregular routes between designated points and a carrier operating over regular routes between designated points.

Congress provided in Section 204 (b) of the Act (49 USCA 304 (b)) that the Commission may classify carriers included in the term "common carrier by motor vehicle" and, pursuant to that authority, the Commission has undertaken to classify common carriers by motor vehicle but that classification, even if reasonable, is of no effect, as a matter of law, unless the classification so made is specifically written into each certificate issued to each carrier, as Section 208 (a) of the Act (49 USCA 308 (a)) makes it mandatory upon the Commission to specify in each certificate the service to be rendered by a carrier and to specify in the certificate the route or routes, if any, over which or the territory within which the operation is to be conducted. Therefore, the Commission cannot, by administrative action, impose limitations and restrictions upon the kind of service a motor carrier can render unless the Commission has specifically incorporated those limitations and restrictions in a certificate that it has issued to a motor carrier.

Congress provided in Section 208 (a) of the Act (49 USCA 308 (a)) that all *certificates* issued under Sections 206 or 207 *shall* specify two things and those two things are: (1) *the service to be rendered* and (2) *the routes over which,* the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, the

motor carrier is authorized to operate or, in case of operation not over specified routes or between fixed termini, *the territory within which*, the motor carrier is authorized to operate. Therefore, a certificate is required to specify the kind of service a motor carrier is to render and then to specify the routes over which the operation is to be conducted or, in case of operation not over specific routes, then the territory within which the operation is to be conducted. Pursuant thereto, the Commission has specified *in the carrier's certificate*, for all common carriers by motor vehicles, only *one class of service to be rendered* by all carriers and then named the specific routes over which some carriers are to operate and, as to other carriers, no specific routes over which to operate were named for them. The carriers for whom specific routes were named are designated "regular route" carriers and the carriers for whom no specific routes over which to operate were named are designated "irregular route" carriers. But the Commission, in this proceeding, has construed "irregular routes" to mean "irregular route carrier service" and "regular routes" to mean "regular route carrier service" contrary to the terms and conditions of the carrier's certificate and the statutory mandate that the certificate shall specify: (1) the service to be rendered and (2) the routes over which or the territory within which the carrier is authorized to operate.

In this view, we have the *full* support of the Interstate Commerce Commission in Consolidated Freight Lines, Incorporated, Common Carrier Application; No. MC 42487, 11 M.C.C. 131, where the Commission said:

> "The term 'route' is not defined in the act. 'Highway' is defined in section 203 (a) (12) as 'the roads, highways, streets, and ways in any State.' In our *certificates we have described routes in terms of particular highways, just as railroad routes, under Part I, are described in terms of particular lines, of railroad.* • •

> "Clearly, it is contemplated that where specified points are to be served, *the 'routes over which' the service is to be rendered shall also be named,* and we know of no way of describing routes for motor carriers except in terms of highways." (Italics added.)

Moreover, Section 203 (14) of the Act, in defining a common carrier by motor vehicle, does not draw a line of demarcation between the kind of service that an irregular route carrier may render and the kind of service that a regular route carrier may render, as both carriers are defined in that section to be any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate commerce of property for compensation whether over regular or irregular routes.

The Supreme Court in *U. S.* v. *Carolina Carriers Corporation,* 315 U. S. 475, in dealing with the difference between an irregular route carrier and a regular route carrier, said:

> "The statutory differences lie only in the territorial scope and pattern of operation."

The territorial scope of a regular route carrier is between fixed termini and the territorial scope of an irregular route carrier is the territory within which the carrier is authorized to operate. The pattern of operation is the *route or routes* over which operation is to be conducted as set forth by the Circuit Court of Appeals (Eighth Circuit) in *Consolidated Freightways, Inc.,* v. *United States,* 136 F. 2d 921 (923), (Petition for writ of certiorari denied 320 U. S. 781), as follows:

> "The words *'route and routes'* are manifestly used *to signify* the *highways where the motor vehicles operate.* * * The *Commission has consistently so construed the law* in its administration." (Italics added.)

The Commission in dealing with *service*, in 32 M.C.C. 199, Jack Cole Company, Common Carrier Application, said:

> "In this connection it may be well to point out that 'service' when applied to a point or place in connection with motor-carrier operations contemplates *interchange with connecting carriers* at such point or place, as well as the *delivery of goods to a consignee* or the *acceptance of goods* for transportation *from a shipper* at such point or place, and such other details as are incidental to the delivery or receiving of the goods."

Therefore, the report and order of January 14, 1946, are erroneous as a matter of law in that the Commission has construed the *pattern of operation* to mean the *quality and quantity of service* to be rendered rather than construing operation to mean the route or routes over which the operation is to be conducted or the territory within which the operation is to be conducted.

APPELLEES AVER THAT THE COMMISSION'S REPORT AND ORDER OF JANUARY 14, 1946, ARE NOT CONTRARY TO THE PROVISIONS OF SECTION 5

Congress provided in Section 5 (2) (a) of the Act (49 USCA 5 (2) (a)) that a carrier may sell and transfer to another carrier *all* or *any part of a certificate* issued to such a carrier without regard to whether the carrier conducts operation between fixed termini, within a territory, or otherwise, as a regular route carrier, irregular route carrier, or otherwise. Therefore, by the clear provisions of the statute, Draper has the right to sell *any part* of his operating rights and Falwell has the right to purchase any part of the operating rights of Draper that Draper desires to sell.

The certificate issued to Draper is divisible or severable as the certificate authorizes common carrier transportation

service between fixed termini which service is required to be rendered over irregular routes. The certificate authorizes Draper to conduct common carrier service between Roanoke, Virginia, on the one hand, and Lynchburg, on the other, and between Roanoke, Virginia, on the one hand, and 26 additional specified points, on the other. The certificate does not authorize Draper to conduct operation between Roanoke, Virginia, and Richmond, for instance, with service at Lynchburg because the certificate does not permit service to be rendered at any intermediate point when operating between Roanoke and one of the 27 specified points. In other words, the operation must be conducted between Roanoke, on the one hand, and each of the 27 specified points, on the other, in separate and distinct operation. Each of the 27 points is a separate unit and the sale of any one or more of the 27 separate units will not in any way impair or interfere with the operation of each of the unsold remaining units.

Division 4 on February 22, 1945, rendered a report and order and granted Appellants a certificate to engage in interstate operation between Roanoke and Lynchburg which report, order, and certificate were in full compliance with the provisions of Section 5 of the Act. However, the Commission, on January 14, 1946, contrary to the specific provisions of Section 5 of the Act (49 USCA 5) considered "consistent with the public interest" to mean whether the operation by Appellants of the Draper rights under the facts and circumstances of this case would necessarily, as protestant claims, involve a conversion of irregular-route operations thereunder into regular-route operations and whether Draper may split, as alleged, his radial irregular route rights in the manner proposed. Therefore, a determination of the two named issues necessarily involved a determination of the operating rights of Draper and those of Falwell and a determination of the kind of service a regular route carrier and an irregular route carrier may render contrary to the specific provisions of Section 5 of

the Act (49 USCA 5) and the last ordering paragraph of the report and order of February 22, 1945, as follows:

> "And it is further ordered, That nothing herein contained shall be construed as a determination of the operating rights of any person or persons under any section of the Act except Section 5 thereof, as expressly determined herein."

Notwithstanding the provisions of Section 5 of the Act and the referred-to order, the Commission specifically determined the operating rights of Draper as follows:

> "The radial irregular-route operating rights of Draper were confirmed under the 'grandfather' clause. The service rendered, and which provided the basis for such confirmation, was a call-on-demand non-scheduled service to and from Roanoke and the numerous specified points. * * The volume of traffic which Draper may have transported in interstate commerce between Lynchburg and Roanoke is not shown, but it is apparent that any such traffic must have been interchange traffic. As the operating rights were granted on the basis of irregular-route operations (not radial), and considering the only available practical highway, it must be assumed that the basis for irregular-route rights (not radial) was that the demand for his service in moving interchange traffic to and from Lynchburg and Roanoke was sporadic, and Lynchburg was named along with numerous other points. * * The use to which vendee would put these irregular-route operating rights (not radial) would bear little resemblence to that which provided the basis for the confirmation of Lynchburg as one of the points served to and from Roanoke under the 'grandfather' clause." ("Not radial" added for emphasis.)

Therefore, the report and order of January 14, 1946, contain information that conclusively shows, upon the face of them, that they are erroneous as a matter of law and

must be set aside as they determine operating rights, impose limitations upon the future growth of a carrier contrary to the last provisions of Section 208 (a) of the Act (49 USCA 308 (a)), and determine the kind of service a carrier over regular routes and a carrier over irregular routes may render.

The imposition of the aforesaid limitations upon the certificate issued to Draper is in fact and substance a revocation of the certificate issued to Draper.

APPELLEES AVER THAT THE FINDINGS OF THE COMMISSION MUST BE ACCEPTED AS TRUE IN THE ABSENCE OF THE COMPLETE RECORD MADE BEFORE THE COMMISSION

Appellees rely upon the decision of this Honorable Court in *Mississippi Valley Barge Line Co.* v. *U. S.*, 292 U. S. 282, 286; *Howard Hall Co., Inc.* v. *U. S.*, No. 627, October Term 1945, affirmed May 6, 1946, in support of their motion to affirm because Appellants did not offer in evidence before the District Court the complete record made before the Commission. The findings of fact are set forth in the report and order of the Commission of January 14, 1946, and the conclusions reached by the Commission from those facts are set forth in the report and order of the Commission dated January 14, 1946, which conclusions are erroneous as a matter of law based upon the facts contained in the report. Consequently, the complete record before the Commission was not necessary to prove errors of law apparent upon the face of the decision of the Commission.

CONCLUSION

Section 5 of the Act (49 USCA 5) concerns the issue of whether a proposed consolidation or merger of the certificates of two or more carriers is "consistent with the

public interest" and, as the report and order of January 14, 1946, deal with the difference between the kind of service an irregular route carrier may render and the kind of service a regular route carrier may render, they are erroneous as a matter of law, as they deal with issues foreign to the issues raised under Section 5. Because a proceeding under Section 5 of the Act cannot be made the vehicle to determine the power and the authority of the Commission to classify the kind of service a common carrier may render and as the decree of the District Court in this suit is apparently being used to support a report and order of the Commission dated February 3, 1947, in Docket No. MC-C-246, Transportation Activities of Brady Transfer and Storage Co., which will carry into effect such a classification, the report and order of January 14, 1946, are not responsive to the provisions of Section 5 of the Act, and they must be set aside as a matter of law.

The report and order of January 14, 1946, are based upon and decide issues foreign to the issues raised under Section 5 of the Act, which decision on the foreign issues makes this suit of national importance to the motor carrier industry, as the decree in this suit of the District Court has been used to support, in part at least, a report and order of the Commission dated February 3, 1947, in Docket No. MC-C-246, Transportation Activities of Brady Transfer and Storage Company.

In the Brady Case supra, at sheet 5 of the mimeographed report of February 3, 1947, the Commission said:

> "The proceeding did, however, afford an occasion for examination of the much broader issue, this is, the general question of what constitutes a regular-route operation in contrast to an irregular-route operation, or the line of demarcation between regular- and irregular-route operations. Because of the nation-wide importance of this broader question, we elected to issue a report indicating only *tentative* conclusions. Such tentative report was accompanied by a "Notice

> to the Public" calling attention to the proposed findings and inviting all interested persons and public bodies, without the necessity of formal intervention, to file exceptions thereto or briefs on the general subject 'of what constitutes a regular-route operation service in contradistinction to an irregular-route operation'."

Therefore, as the decree in this suit of the District Court has been used to support, in part, a report and order of the Commission which report and order involve a question of nation-wide importance, this suit is relegated to a suit containing questions of national importance and suggests that the suit should be heard and decided by this Honorable Court.

Moreover, the importance of this suit to the entire motor carrier industry and to the general public is recognized by the fact that the Irregular Route Motor Carrier Conference and the Regular Route Motor Carrier Conference, no doubt, will file briefs *amicus curiae* in this suit. Therefore, this suit is of national importance and should be heard on its merits. Then too, construing the words *route* or *routes* to mean *service* is contrary to the decision of the Commission in Consolidated Freight Lines Case, 11 M.C.C. 131, where the Commission said that:

> "In our certificates we have *described routes in terms of particular highways.*" (Italics supplied.)

Consequently, the report and order of January 14, 1946, are contrary to decisions of the Commission and to statutory provisions. The Motion to Affirm should be denied and we so pray.

Respectfully submitted,

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